Supreme Court of the United States.

OCTOBER TERM, 1899.

JOHN N. QUACKENBUSH, *Appellant*,
v.
THE UNITED STATES, *Appellee.*
No. 145.

APPELLANT'S BRIEF.

Assignment of Errors.

The Court below erred:

1. In holding that "The validity of the sentence of the court martial to dismiss, or of the appointment by the President, of W. S. Schley to remove claimant from the service, becomes important here only in respect to the claimant's right to retain the money thereafter paid to him."
2. In holding that "The Congress, by their act [a special act for appellant's relief] construed the sentence and the action of the Executive as having terminated the claimant's service in the Navy, by referring to him as 'late a Commander in the United States Navy, etc.,' and in holding that the Congress could thereby validate an invalid dismissal, annul a pardon, or in any way affect appellant's vested rights.
3. In holding that "Whether the claimant was, by virtue of the sentence of the court martial or of the ap-

pointment of W. S. Schley, legally out of the naval service at the time of the passage of the act authorizing his re-appointment, it was unnecessary to determine."

4. In holding that "The rights of the parties must be measured by the act under which the claimant seeks to recover."
5. In holding that appellant's rights were to be measured by the rule laid down in Blake *v.* The U. S. (103 U. S. 227).
6. In holding that the act for the relief of appellant, which became a law without the President's signature February, 1897, did not confer rights of pay as well as of honor, rank and station, from August 1, 1883.
7. The court below erred on the whole case and in dismissing the petition.

Statement of the Case.

Appellant was commissioned a Commander in the Navy of the United States January 2, 1872, to rank from May 25, 1871. (Finding I.)

In February, 1874, he was tried by court martial and sentenced to be dismissed the service, which sentence was approved by the President June 5, 1874. Notice of this dismissal was addressed to appellant by the Secretary of the Navy, at Boston, Mass., June 9, 1874. June 10, 1874, Lieut. W. S. Schley was nominated "to be a Commander in the Navy from the 10th of June, 1874, vice Commander John N. Quackenbush, dismissed," and was confirmed June 12, 1874, and commissioned the same day. On June 12, 1874, the Secretary of the Navy addressed a letter to appellant as "*Commander* John N. Quackenbush, U. S. N.," at Boston, Mass., directing him

to "return to the Department the order dismissing you (him) from the Navy." (See letter Secy. Thompson to Atty. Gen., Rec., p. 6.) This letter and the letter of dismissal of June 9, were received by the appellant in the same mail. (Finding IV.)

On December 8, 1874, the Secretary of the Navy addressed a communication to appellant, as "*Commander* J. N. Quackenbush," referring to the sentence of dismissal and saying—

> "This sentence was on the 9th day of June, 1874, mitigated to suspension from rank and duty, on furlough pay, for six (6) years, the suspension to date from that day." (Sec. Thompson's letter, *supra*, Rec., p. 7.)

Appellant immediately entered upon the service of his commuted sentence, being borne upon the official Naval Register as a Commander under suspension. He was discharged from suspension June 8, 1880. During these six years he was paid $1,150 per annum, being the furlough pay of his grade, according to the terms of his commuted sentence, and was advanced in numbers on the Naval Register as vacancies occurred by reason of the death, dismissal or promotion of his seniors. (Findings VII–VIII.)

On December 13, 1877, the Secretary of the Navy (Thompson) addressed a communication to the Attorney-General reciting substantially the foregoing, and asking his opinion "whether it is competent to admit parol evidence that the President assented to the mitigation, on the 9th day of June, of the sentence of dismissal; and if so, whether the President had the power to remit after the sentence of dismissal had been approved and duly exercised and the vacancy filled."

On March 16, 1878, the Attorney-General (Devens) in

an elaborate opinion (15 Ops., 466) fully sustained the President's action, and consequently that appellant was still an officer in the Navy. (Finding X, Rec., p. 8.)

On June 10, 1880, immediately after the expiration of his commuted sentence appellant applied for duty. The proper accounting officers and the paymaster having charge of his accounts were notified of the expiration of his sentence, and from that date he was taken up as on "waiting orders pay," and so paid until March 31, 1881, when his pay was stopped, but for what reason does not appear. (Finding IX.)

The next step in this peculiar drama appears in the following—opposite claimant's name in one of the records of the Navy Department:

> "208. John N. Quackenbush—
> Left off register published 1st August, 1883, by direction of the Secretary of the Navy; his action being based upon a decision of the Supreme Court."

No reference is made to the particular case, so we are left to presume that it was the "Blake Case" the Secretary relied on.

On December 6, 1883, the Secretary of the Navy designated to the President, D. W. Mullan, to be a Commander in the Navy, "Vice John N. Quackenbush, no longer in the service," who sent the nomination to the Senate which, in due course, confirmed the same, to date from July 3, 1882. (Finding XV.)

In February, 1897, the Congress passed an act for the relief of appellant, which became a law without the President's signature (Stat. L., p. ——), and in conformity therewith appellant was nominated to the Senate, to be, and was confirmed and commissioned, a Commander in the Navy, to rank from August 1, 1883, and placed upon

the retired list from June 1, 1895, the date when he reached the age of retirement. (Findings XVIII and XIX.)

BRIEF OF ARGUMENT.

The opening clause of the opinion of the court below does not properly explain our contention. It states that we claim under the "following statute"—(the private relief act). Reference to our petition will show that we specifically claim as well under the Revised Statutes, as the relief act. In other words, we claim that under the most peculiar circumstances of this case appellant was never out of the Naval Service, but that if we err in this, then the relief act rehabilitates and reinstates him from August 1, 1883. If the Constitution, the general laws, and the special act, are not sufficient to accomplish this, there will be forever a stain of deep injustice on the United States.

Sentence and Commutation.

The sentence of the court martial was approved June 5, 1874. Notice of dismissal was mailed to appellant June 9, 1874. An order was mailed to appellant June 12, 1874, directing him to return the letter of dismissal to the Department. This communication was addressed to *Commander* John N. Quackenbush, U. S. Navy. This fact is conclusive that the Department on June 12 "did not consider the sentence to have gone into effect, and also shows that the Secretary's letter of December 8," 1874, officially notifying appellant of the commutation of his sentence of June 9"—was not a mere *nunc pro tunc* order, but was a delayed notification of an antecedent official act.

It is not necessary that the President should sign the order of commutation with his *sign manual* (U. S. *v.* Fletcher, 148 U. S., 84; U. S. *v.* Page, 137 U. S., 673.) It is impracticable for the President to give his personal attention to all the minute details of the various departments, and he must depend upon his cabinet officers. (Williams *v.* U. S., 1 How., 290.) In regard to the case at bar, Attorney-General Devens said (15 Ops. Atty.-Gen., 465):

> "The directions of the President respecting the mitigation of the court martial sentence may be, and frequently are given *ore tenus*, and left to be formally made known and carried out through the head of the appropriate department. When this is the case, the orders or instructions of the latter, issued in discharge of that duty, constitute primary and perhaps conclusive evidence of what the directions of the President were."

The approval of June 5, 1874, was, however, according to Winthrop, a necessary prerequisite to the exercise of clemency. He says (Winthrop's Military Law, p. 686):

> "Unless the sentence has been previously duly approved, and thus has a legal existence, it can not, nor can any punishment included in it, be either remitted or mitigated."

The legal inference, therefore, is that the approval was merely an incident to the commutation of June 9, and that the transmission of the order of this date by the Secretary was an official error, committed in the rush of departmental business.

There is one thing, however, which is absolutely essential to the execution of a sentence of a court martial, and which is wholly lacking in this case, viz., *notice to the accused*. We quote at length from military authorities.

"This punishment (dismissal) is executed by operation of law, immediately upon *approval or confirmation and notice* to the officer. Upon the day of the official announcement *to an officer* of the approval or confirmation, by the proper authority, of a sentence dismissing him from the military service, his connection with the Army ceases, and he becomes a civilian." (The italics are the authors.)

This rule is observed by the department in General Orders.

"A legal sentence of dismissal of an officer when finally confirmed by the competent authority, (according to the 106 and 109 Articles of War) takes effect upon the officer on the day which the confirmation is officially communicated to him, either by the promulgation of the order of confirmation at his station, or other form of official notice." (Wintrop's Dig., A. G. Ops., 366.)

"The notice of the order, (dismissal) to effect the officer should thus be a *personal* notice, actual or constructive, and it should be an official notice. * * *

"Up to the date of personal official notice of an order separating him from the military service as an order of summary dismissal by the President, or an order wholly retiring him, or an order confirming his sentence of dismissal adjudged by the court martial, an officer is entitled to be paid by the U. S. the regular and legal pay and allowances of his rank. The date which the order bears as that of the issuing or signing of the same, is immaterial, if notice of the same is not duly brought home to the officer till on a subsequent day." (Same, pp. 545-6.)

The same rule is followed by the Court of Claims. (Gould *v.* U. S., 19 C. Cls., 593; Allsteadt *v.* U. S., *idem*, 290.)

It is also enforced by the accounting officers of the Treasury.

> "Officers discharged to take effect from a particular anterior date, who do not receive notice of the discharge until sometime afterwards, and who in the meantime continue on duty, are entitled to pay to the date when notice of discharge was received." (2d Compt. Dec., vol. 1, p. 157.)

The Department of Justice also adopts the same view of the law. (6 Ops. Atty.-Gen., 37; *idem*, 379 and 7; *idem*, 303.)

This court adhered to the same general proposition in Mimmack *v.* U. S. (97 U. S., 426):

> "Nothing short of a resignation to the President or the proper Executive Department by a commissioned officer of the Army, Navy or Marine Corps, and the acceptance of the same duly notified to the incumbent of the office in the customary mode, will of itself create a vacancy in such office, etc." * * *

Thus it appears that the three Executive Departments before which this question could naturally arise, and the Judicial Department, have for all time agreed that an actual personal notice of dismissal, to the accused, was essential to its execution.

Appellant was not served with notice of dismissal until after the President had exercised his undeniable power of pardon, and the verdict of dismissal had been changed into one of suspension.

It is true that the letter of the Secretary of June 9th stated that the dismissal was to take effect "*from this date,*" but the authorities agree that these words are mere surplusage. (Winthrop's Military Law, p. 620; see also Winthrop's Dig. Ops. Adg.-Gen., 6.)

It thus appearing that the order of dismissal never

having been carried into effect, but having been commuted and carried into effect, it is proper next to consider

Schley's Nomination and Confirmation.

Did Schley's nomination and confirmation "Vice Commander John N. Quackenbush dismissed" *ipso facto* operate as a dismissal of appellant?

The defendants maintained that such was the law, and the court below so held upon the authority of Blake *v.* U. S. (103 U. S., 227). We maintain, on the contrary, that the facts of the case at bar are so peculiar as to take it out of the scope of the Blake case, and to entitle it to stand on its own merits.

It must be borne in mind, that after Schley's nomination and confirmation in the place of this appellant "dismissed," when in point of law and in fact, as already shown, he had not been dismissed, he (this appellant) served for full six years a sentence of humiliation and disgrace; that he then reported for duty and was put on waiting orders, and so continued until August 1, 1883; that he was borne on the Navy register all this time and advanced in numbers as vacancies arose; that on August 1, 1883, without trial or notice he was dropped from the Naval register, "under a decision of the Supreme Court"; and that finally, in December, 1883, the nomination of D. W. Mullan was sent to the Senate and confirmed as a Commander, "vice John N. Quackenbush, no longer in the service."

Both the nomination of Schley and of Mullan contained on its face a misstatement of fact.

A naval officer holds his *position in the Navy* for life, or what is equivalent, during good behavior. This tenure is not fixed by the Constitution, or specified by

any particular statute, but such is the fact in every civilized nation which maintains a standing Army and Navy. In this country a person enters the Navy in his youth as a cadet; the best years of his life are spent in the active service of his Government, and in appreciation of such services provision is made for his old age by retirement. His dismissal in time of peace is prohibited, except in pursurance of a sentence of court martial of commutation thereof. (R. S., Sec. 1624, Art. 36.) A position in the military service is unlike one in any civil service, owing to promotion to various progressive grades as of right. Such a position is a generic one, divisable into sundry sub offices, ranging in the Navy, from cadet midshipman to admiral. The inhibition of section 1624 is not directed against dismissal from any one of these subdivisions, but includes the whole period of the life tenure. The President has no power to dismiss an officer in time of peace "under any circumstances, or for any cause, or by any authority whatever, except in pursuance of the sentence of court-martial to that effect, or in commutation thereof." (Blake *v.* U. S., 103 U. S., 227–237.)

The power to dismiss an officer of the Navy is therefore hedged in and guarded not only by the statute referred to, and by usage and custom, but also by the fact that it is an appointment for life, or during good behavior.

It is true that physical or professional incapacity may render an officer unfit for promotion or for active service, but in such cases the statutes amply provide for the method by which his connection with the service may be severed. In other words, a person once in the Navy is there for life, subject only to his professional and physical fitness for the duties of his office, and to his good behavior.

In this it differs from all civil offices except the

judiciary. Neither the President nor the Secretary of the Navy, singly or together, have any discretionary power or control over a naval officer's title to his office or to his right to emoluments thereof, other than that conferred by statute.

The case of Blake *v.* U. S. (*supra*), holds, in line with many other cases, that "there was no purpose by the 5th Section of the Act of July 13, 1866 (R. S., Sec. 1624, Art. 36), to withdraw from the President the power, *with the advice and consent of the Senate*, to supercede an officer in the Military or Naval service by the appointment of some one in his place." (See also Keyes *v.* U. S., 109 U. S., 336; U. S. *v.* Fletcher, 148 U. S., 84.)

We do not dispute this proposition, but insist that this court would not have laid down this rule without qualification, if it had had the peculiar and exceptionable facts in the case at bar before it for consideration.

The "advice and consent of the Senate" is necessary in order to depose one officer in favor of another, and can it be possible that our courts are powerless to relieve in a case, where, as in the one at bar, that advice and consent was obtained by a clear and palpable misstatement, inadvertent we admit, but none the less misleading?

This case, we submit, comes rather within the scope of Runkle *v.* U. S. (122 U. S., 543), as explained by U. S. *v.* Fletcher (148 U. S., 84), than of those cases last above cited. These two cases, read together, as we understand them, simply announce the doctrine that every case like the one at bar must be governed by its own peculiarities.

In all the numerous cases which have been before this court and the Court of Claims, where there has been an attempted restoration to the service by Presidential revocation of an order of dismissal, or acceptance of a resignation, an examination of the facts will show that there

had been an *actual and complete severance of all connection with the service.* In that event, it matters not whether there has been a nomination and confirmation to fill the vacancy, such vacancy owing its existence to other equally effective causes, and can only be filled by the methods prescribed by the Constitution. After the officer is *once out* he can only be restored by the President by and with the advice and consent of the Senate. (Bennett *v.* U. S., *supra*; Palen *v.* U. S., 19 Ct. Cls., 389; Montgomery *v.* U. S., do., 370; Miller *v.* U. S., do., 338; Vanderslice *v.* U. S., do., 480; Bennett *v.* U. S., 19 Ct. Cls., 79.)

These cases all differ, however, in every essential point from the one at bar. In some of them, where nominations and confirmations had taken place, the rights of third parties might possibly have been affected, but *in all* the severance was complete before the attempted restoration, by an actual dismissal, in pursuance of an approved sentence of court-martial, or by an accepted resignation, coupled, in every instance, with notification.

Vacancy and the President's Power of Appointment.

We have argued that there was no vacancy in the grade of Commander on June 10, 1874, because appellant's sentence of dismissal had been commuted on June 9, the day preceding.

As before shown, in every case of this character, which has been before the courts, there had been an actual vacancy created before restoration was attempted. For this reason, probably the statutes governing the power of the President, and limiting his constitutional prerogative to "fill up vacancies," have not been called to the attention of this court, so far as we are advised.

Section 1496, R. S., provides:

> "No line officer below the grade of Commodore, and no officer not of the line, shall be promoted to a higher grade on the active list of the Navy until his mental, moral, and professional fitness to perform all his duties at sea have been established to the satisfaction of a board of examining officers appointed by the President."

It is customary to examine officers in these essential qualifications in anticipation of their prospective promotion, and it is presumable that these requirements had been carried out in Schley's case, so as to render him eligible to promotion *when a vacancy occurred*.

It is a self-evident proposition that no promotion, to a grade limited by law, could be made until there was an actual vacancy caused by death, resignation, or dismissal, but that there might be no possibility of mistake the Statutes provide:

> "Sec. 1495. Officers subject to examination before promotion to a grade limited in number by law shall not be entitled to examination in such a sense as to give increase of pay until designated by the Secretary of the Navy to fill vacancies in the higher grade * * * ."

To make the question still plainer, so far as pay was concerned, the following will be found in the Supplement R. S., 1891 (83):

> "That on and after the passage of this act, any officer of the navy who may be promoted in course to fill a *vacancy* in the next higher grade shall be entitled to the pay of the grade to which promoted from the date he takes rank therein, if it be subsequent to the *vacancy* he is appointed to fill."

In Adamson *v.* U. S. (19 Ct. Cls., 623), it was held that

the actual existence of the vacancy was the crucial test as to the right of claimant to recover back pay, and the court fully sustained this position in Hunt *v.* U. S. (116 U. S., 394).

Thus there are certain prerequisites which must be complied with before promotion, viz: *Examination* and designation to fill an *existing vacancy*. The President can not be presumed to have such exact information touching the detailed personnel of the navy, as the Secretary who is by law charged with the personal supervision of that branch of the service; hence the provision of the statute that the Secretary must make a designation to fill a vacancy. This designation imports the co-existence of two essential facts, viz: the mental, moral, and physical fitness of the officer to perform the duties of the higher grade, and the existence of a vacancy to which he is eligible. Both are conditions precedent to the legal exercise of the constitutional power of the President to fill vacancies. Neither law, experience or common sense impute infallibility to the Secretary of the Navy, and he may as well be wrongly advised or misinformed upon any question of fact as a private citizen. His official position clothes his statements with no such sanctity as to make that true which is in fact not true. Neither his opinion, his statement, nor his official act can create a vacancy when none, by law, exists. (U. S. *v.* Redgrave, 116 U. S., 484; U. S. *v.* Perkins, do, 483).

> "By the settled practice of the service promotion to a higher grade includes the right to the rank of that grade from the date of the vacancy filled by the promotion." (18 Atty.-Gen. Ops., 394.)

No promotion can be complete and perfect unless it carries the increased pay incident to the higher grade. Pay is one of the essential elements to a perfect and com-

plete title to an office, and if the right to the emoluments of the higher grade is lacking the promotion is incomplete. No such right can by statute be acquired until a vacancy has been created in the higher grade, and there has been a legal designation of a duly qualified person to fill the same.

It would thus seem that the President had no legal authority to forward the nomination of Schley to the Senate, and the question arises, Has this court, in the exercise of its jurisdiction, the power to go behind the nomination of Schley, "*vice* Quackenbush dismissed," and determine whether the facts existed as stated, and, if not, to grant relief?

The power of the President to fill offices is dependent upon Article II, Section 2, Clause 2 of the Constitution, which provides:

> "And he shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by the law * * * and; (*Idem*, clause 3.)
>
> "The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting Commissions which shall expire at the end of their next session."

The grant of power in these two clauses is distinguishable only by the existence of facts. Under the first, his power of nomination to fill new offices, or to fill vacancies occurring in existing offices during the session of the Senate, is one in which the responsibility is divided, and the President's action only becomes final and operative when it is concurred in by that body. Hence the efficacy of his act under this clause depends upon the ***fact,***

whether or not the Senate be in session. Under the second clause the responsibility is not divided, but rests alone in the Executive, and his mere *appointment and commission* fills an existing vacancy. It is true that it fills only for a limited time, viz: "until the end of their (the Senate's) next session," but it is, *pro tanto*, as absolute in every respect, as though approved by the Senate. The power is the same, subject only to a different condition of existing circumstances. The existence of any fact, therefore, which would invalidate the appointment of an officer under the second clause, would likewise render it null and void under the first clause, if it existed, because under both the same power is exercised and the same end attained. The Congress has been careful, with reference to political or executive officers, both where the tenure of office is fixed, as in the case of postmasters (R. S., Sec. 3830), and where it is not fixed, as in the case of other civil officers, such as Auditors of the Treasury Department, Comptrollers, etc. (R. S., Sec. 1767), to specifically provide for the removal of an incumbent by the nomination and confirmation of his successor. Not so, however, with regard to the Regular Army and Navy, because positions in those branches of the service are held for life or during good behavior, if not by law, by custom in all civilized nations, and by reason of the peculiar and technical nature of their employment. The Military branches of our Government are coexistent with the Government itself, and the tenure of office for life has always been an integral part of the system.

Schley's nomination and confirmation was not to a new office, or to one which was vacant by operation of law, but was to one of the grades or sub-divisions of the life position of an officer of the Navy. The office of Commander, is, of course, not a life office, but it is part and parcel and one of the intermediate grades of a life posi-

tion, which, taken as a whole, ranges from the rank of midshipman to that of Admiral. This nomination must have been made, therefore, to fill a vacancy caused by the legal ouster of Quackenbush, because the latter had the vested right to pursue an uninterrupted course from midshipman to Admiral, limited only by existing laws, and those which might in the future be enacted.

The Constitution of Kentucky contains in *totidem verbis* the provisions of Clause 3 of Sec. 2, Art. II of the Constitution of the United States.

In construing this section, in a learned and exhaustive opinion, the court, through Mr. Justice Marshall, says (Page *v.* Hardin, 8 Ben. Monroe, 6–9):

> "If the Executive could not create a vacancy by his deliberate official act, after full and mature consideration and an express intent and determination to do so, it would seem beyond dispute that he could not so do when his act did not involve any examination of the question of vacancy, or the exercise of any discretion, but was entirely perfunctory and of a routine character, and effected a result which was repugnant to his wishes and intent.
>
> "The Constitution (Art. III, Sec. 10) confers upon the Governor the express power 'to fill up vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session.' But this clause certainly gives no power to make a vacancy by declaration or judgment that one exists, or by granting a commission to fill one assumed to exist. There must be a vacancy before the power or duty of filling it arises. And although having the power to act in a particular state of case, the Governor must decide for the determination of his own action, whether and when the designated state of case exists, still the constitutional power of granting the commission, and therefore, the legal validity of the Act, is made to rest upon the fact of an actual vacancy, and not

upon his opinion or judgment of the fact. To say that his opinion or judgment of the existence of a vacancy is to be the sole and conclusive test of the fact, is to make him the sole and conclusive judge of all the acts and causes which may produce a vacancy; and to change a tangible into an absolute power, and must ultimately result in converting the power to fill a vacancy already existing, into the power of creating a vacancy to be filled. Such a power, which would place within the uncontrolled discretion of the Governor, not merely the selection of a person to fill an office actually vacant, but the displacing of an officer under the form of filling a vacancy, is not conferred by the clauses in question, and is moreover inconsistent with those clauses which fix the tenure of office during good behavior, and which therefore give to the officer the right to hold according to that tenure. If the Governor may determine conclusively upon the existence of a vacancy, there is no security for this right, but by imputing to him an infallibility which belongs to no earthly officer or tribunal, which the Constitution imputes to no one, and which can not be regarded as the guarantee of constitutional or legal rights.

* * * * * * *

"In the decision of the question of vacancy by the Governor his investigation is directed by his own discretion, and there is no prescribed mode of trial which may insure the attainment of the truth. As the decision may be made in the absence of the party concerned and without notice, so it may be founded upon false or forged testimonies, or upon inferences easily disproved.

"In the cases of Bruce *v.* Fox (———), and the Jefferson Justices *v.* Clarke (———), this court decided against the decision and act of the Governor the very question of the existence of a vacancy and of his right to make an appointment, as a matter of law upon undisputed facts. And if the decisions of the Governor may be thus questioned on grounds of mere law, there must be an equal right to question

> it upon the ground of fact. To deny the right to retry such question on both the law and the fact, is to deny to the right of an officer the usual protection of the law, and to submit it to the discretion of the Executive."

The foregoing is summarized on page 677 as follows: "The Governor may fill an existing vacancy but can not, in our opinion, in any manner create one in an office by his judgment or decision as to the existence of a vacancy."

The courts have the power to declare solemn acts of the legislative branch of the Government null and void, where they infringe upon vested rights, and a like power must be accorded them where the acts of a co-ordinate branch of the Government, the Executive, has the same effect.

We use the term "vested rights" in a qualified sense; not as it is usually applied to property interests, but as signifying a right vested in Quackenbush to remain in the Navy until he died, resigned, or was dismissed therefrom, or until Congress legislated him out of office. He became an officer of the Navy by reason of legislative enactment, and he could only cease to be one by the same authority. The executive and the legislative stand, with reference to the judicial branch of the Government, on exactly the same plane, and the acts of both are subject to judicial investigation. In Page *v.* Hardin (*supra*), the court says:

> "An office is not vacant so long as it is supplied in the manner provided by the Constitution or the law, with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it. (See, also, Stocking *v.* State, 7 Ind., 326; Collins *v.* State, 8 do., 344; Akers *v.* State, 8 do., 484; State *v.* Bemerderfer, 96 do., 374; Gasman *v.* State, 106 do., 206; State *v.* Butler, 20 do., 169; People *v.* Tilton, 37 Colo., 614; State *v.* Lusk, 18 Mo., 333; Com. *v.* Hartley, 9 Penn. Stat., 513.)

Where the power of appointment has been exercised in the manner prescribed by law, any subsequent appointment will be void, unless the incumbent has been legally removed from office or it has otherwise become vacant. (Thomas *v.* Burns, 23 Miss., 550; People *v.* Woodruff, 32 N. Y., 355.) But if the Executive has acted upon a mistaken state of facts and has issued the commission to the wrong person, he may revoke it and reissue it to the person legally entitled. (Gulick *v.* New, 14 Ind., 93; State *v.* Capers, 37 La. An., 747).

From a very early date the opinions of the Attorney-General have been unanimous that the President's power under the third clause of Art. II, Sec. II of the Constitution was dependent upon the fact of the actual existence of a vacancy to be filled. (1 Ops., 631; 2 do., 525, 3 do., 673; 7 do., 186; 10 do., 356; 11 do., 179; 12 do., 32, 449).

By way of illustration, without doing violence to possibilities, suppose word should be received that Rear Admiral "A," commanding the Asiatic Station, was dead, and the Senate being in session, the President immediately nominated Commodore "B" to be a Rear-Admiral, "vice 'A' deceased," and the Senate consented thereto, when in fact Admiral "A" was not dead. In such a case there would be a most serious omission in our judicial system if the Courts could grant "A" no relief. It may be said that Congress could correct the error; that is true, but courts are organized for the purpose of protecting private rights, and one of their most solemn duties is to guard against mistake and fraud. To carry the illustration further, suppose "B" not to have been a Commodore, but a Captain or a Chaplain, or for any other cause, not in the direct line of promotion, or suppose there had been no such person in existence, the act of the President, sanctioned by the Senate, could not have the effect which it is sought to give to the nomination of Schley. Another

illustration may be drawn from the Army, where in certain grades promotion does not go by seniority. Suppose at the retirement of General Miles, two parties of the same name are eligible for promotion to his place, and the nomination is made in the usual form, "vice Miles retired," without words of description of the promoted officer, and is confirmed by the Senate. Which is to take the office? Each by color of right might claim, but the actual meaning and intent of the appointing power must prevail, and that could only be shown by a judicial investigation.

Again, suppose in the case of the senior major-general or admiral, the nomination of the officer to succeed either, upon retirement, read, by mistake or "blunder," "vice 'A' dismissed" instead of "vice 'A' retired"; would any court have held in such a case, that General Sherman or Admiral Porter had, through the undiscovered blunder of some copying clerk, been summarily dismissed from the service, and that they must go to Congress for relief?

If power to do justice in this case can not be found in the general jurisdiction of this court, then we insist that there was a

"Mistake" Against Which this Court Can Relieve.

The Executive can not be presumed to be at all times perfectly familiar with all the details of the record of each of the hundreds of individual officers under his direct supervision, and from necessity, much of such detail work is left to clerks and other inferior officers, whose acts carry with them no conclusive legal presumption of verity.

Ex-President Grant says on this subject (see H. Report No. 1432, 53d Congress, 2d session):

> "The matter of nomination or promotion in the army or navy is regulated by law so that the Executive scarcely thinks to look at the nominations when they are put before him, supposing, of course, *they are to fill vacancies.* In this way it seems Commander Quackenbush was *suspended*, and now finds himself in the danger of being out of the navy by a recent decision in another case. I remember of Commander Quackenbush, but not the details of my action. I have no doubt, however, but that the Hon. George M. Robeson, then Secretary of Navy, knows and remembers all about it."

Ex-Secretary Robeson did remember "*all about it,*" and writes:

> "The nomination of Schley, '*vice* Quackenbush,' went through in some incomprehensible manner, and when brought to my attention, as it made an excess of numbers, I ordered no nominations to be made for the position shortly after vacated by the retirement of Morris, which reduced the number of commanders to legal limits." (Same Report.)

The conclusion reached by the Committee on Judiciary of the House of Representatives, upon a full and careful examination, was that:

> "The nomination of Mr. Schley to the position of Commander contained, through the *blunder* of some clerk the words '*vice* Quackenbush, dismissed,' when such was not the fact, and the confirmation of the appointment by the Senate was upon the state of facts that it did not exist in point of fact. * * * It is plain that the use of the words, '*vice* Quackenbush' in the nomination of Schley was a *mistake*, and not in accordance with the records, and was incomprehensible to even the Secretary of the Navy. If this was an unintentional act and clerical blunder, it ought not to have the effect of destroying the record status of Mr. Quackenbush as Commander." (Same Report.)

The nomination of Schley, submitted to President Grant, and by him laid before the Senate for its "advice and consent," was based upon, and contained upon its face, a false statement. Quackenbush had not been, in law or in fact, dismissed. He was still an officer, and held his office *cum onere*. That falsification of the record may have been, and presumably was, the result of inadvertence or mistake; but it was none the less false and misleading. The Senate, by the advice and consent of which alone, Schley could become a Commander, was deceived to the actual, though not legal, detriment of appellant.

It can not be presumed that such high officials as the President and Secretary of the Navy, in the exercise of their Constitutional duties, would willingly be parties to a fraud upon that body.

It must be conceded that the power vested in the President, by the Constitution and laws, of selecting and nominating officers of the Navy, does not create for him a mere prerogative as of right, but imposes upon him a sacred trust in making these selections, and in displacing those who are in office.

> "In every appointment he ought to consider himself as executing a public trust." (2 Story on Const., 4th Ed. Sec 1533–1540.)

It was never contemplated by the Constitution that the President would exercise this power unadvisedly, harshly or unjustly. The law presumes that he will do only the law, and a most strict observance of all formalities and prerequisites is enjoined in the exercise of the appointing power, especially where vested rights are involved.

Mr. Madison contended that "the wanton removal of meritorious officers by the President would subject him

to impeachment and removal from his high trust." (1 Lloyd's Debates, p. 503; 2 Story on Const., 1541.)

If for no other reason, we insist that upon the grounds of palpable error or *mistake* this Court has jurisdiction, and that it is its duty to relieve appellant from the consequences of that falsification of the record by which the Senate was influenced to give its consent to an act which was not contemplated or intended by the Executive.

The Act of Congress of March 3, 1887, (R. S. Supt., 559) gives this court the same equity jurisdiction which Courts of Chancery exercise in questions between individuals. The Government occupies no higher plane than that occupied by a private party.

In construing this act this court say (U. S. *v.* Jones, 131 U. S., 1–20):

> "It seems, therefore, that in the point of providing only for money decrees and money judgments, the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands."

Prior to the passage of this act, this court had only a strictly legal jurisdiction, in questions between the Government and a citizen, but that jurisdiction extended to all money demands growing out of any Act of Congress, departmental regulation, or out of contracts express or implied. The "extension" of this jurisdiction to equitable money demands, in the absence of words of limitation, must be co-extensive with the pre-existing legal jurisdiction, and to carry it into effect all equitable principles may be invoked.

The "District Claims Act" (Suppl. R. S., 592) is no broader in its terms than the act of 1887 (*supra*). It reads:

> "SEC. 1. That the jurisdiction of the Court of Claims is hereby extended to, and it shall have original, legal and equitable jurisdiction of, * * *

In the much discussed case of Harvey *et al*, *v.* U. S. (8 Ct. Cls., 501; 13 do., 322; 17 do., 443; 18 do., 470; 105 U. S. R., 671; 113 U. S., 243), arising under a special act of Congress, the jurisdictional grant was more verbose and explicit in terms, but no broader than in the foregoing acts. The latter part of the special act empowered the court to proceed "as a court of equity jurisdiction" to "reform said contract," and "to render such judgment as justice and right between the claimant and said Government may require." The word "Equity" is the governing one, and derives no additional force or effect from those which follow. In that case Mr. Nott, J., in a dissenting opinion, says:

> "At the time when the mistake was discovered, the claimants had no Court of Equity into which they could bring the Government, either to reform the contract because of the mutuality of the mistake, or to rescind it because of their own. I hold that the purpose of the private act was to cure that defect of jurisdiction, and that it confers upon this court the most ample power to do justice." * * *

This seems to be the view adopted by this court, and is applicable to the case at bar.

In regard to the jurisdiction and powers conferred by the District Claims Act (*supra*), Mr. Drake, C. J., says (Cullinane *v.* U. S., 18 Ct. Cls., 594):

> "It is a well settled rule of equity jurisprudence that if, in such a case, the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract, so as to make it conformable to the *precise intent* of the parties."

The power of a Court of Equity to grant relief where wrong is done between individuals through mistake of fact, is too well settled to need comment, and in certain cases it will relieve against mistakes of law.

By the Act of 1887 (*supra*) the Court of Claims and the Circuit and District Courts of the United States were invested with the same full equity jurisdiction in questions between the individual and the Government as is exercised by ordinary Courts of Equity between individuals. The Court of Claims can not take cognizance of questions, either legal or equitable, between private parties, and, therefore, the broad grant of unlimited equity jurisdiction must *ex necessitate* involve the power to review the action of executive officers; and, where the subject matter in dispute is a money demand, to grant the same measure of relief which would be granted by an ordinary court of equity in controversies between individuals.

Under the jurisdiction exercised by the Court of Claims, prior to the Act of 1887 (*supra*) it is safe to say, that every decided case, in some way, reviewed the action of one or more executive officers, from a purely legal point; and that Act only imposed the additional duty of reviewing them from an equitable standpoint. It matters not that, as in this case, the action to be examined is that of the highest Executive—the President. That officer is not the source of Executive power; his duties and powers are as much prescribed and limited by the Constitution, and by statutes as those of any inferior officer. The theory that the "King can do no wrong" has no existence in our system of jurisprudence. No matter how grave the question involved, or how solemn his action, it is not above or superior to the law, and where private rights are invaded the courts can grant relief.

The Revised Statutes (sec. 458) prescribes that "all patents issuing from the General Land Office shall be is-

sued in the name of the United States and be signed by the President," just as the Constitution imposed upon the President the duty "to commission all officers of the United States." (Art. 2, sec. 3.)

In both instances the duty is one devolving upon the President personally, and one which can not be delegated, but one is of no more solemnity than the other, especially when, as in the case at bar, the commission is one issued in pursuance of law and custom, and involves no exercise of Executive discretion.

In Johnson *v.* Towsley (*supra*), this court, by Mr. Justice Miller, says:

> "On the other hand there has always existed in courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice and wrong, in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the Crown, or other executive branch of the Government, have been corrected, or declared void, or other relief granted."

So in Stark *v.* Starr *et al.* (16 Wall., 402), where patents had issued to two different parties for the same land, the Supreme Court, reversing the Supreme Court of Oregon, declared one patent void and gave validity to the other.

In Garland *v.* Wynne (20 How., 6), there had been a conflict between two claimants of a right of pre-emption to the same land, under different statutes. Garland held patent, but Wynne, whose entry was the elder, held only register and receiver's certificate, but the Supreme Court decreed the title in Wynne.

(See also, Lindsey *v.* Hawes, 2 Black, 554; Lytle *v.* Arkansas, 22 Howard, 193; McArthur *v.* Browder, 4 Wheat., 488; Hunt *v.* Wickliffe, 2 Peters, 201; Green *v.* Liter, 8 Cranch, 229; Finley *v.* Williams, 9 Cranch, 164; Gibson *v.* Chouteau, 113 Wall., 92; French *v.* Fyan, 3 Otto, 169; Moore *v.* Robbins, 6 Otto, 630.)

In Marquez *v.* Frisbie (101 U. S., 405), Mr. Justice Miller enunciates the following:

> "But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that these officers have, by *a mistake of the law*, given to one man the land which, in the undisputed facts, belonged to another, to give appropriate relief. (Reaffirming Johnson *v.* Towsley, and Moore *v.* Robbins, *supra.*) * * * But if it can be made entirely plain to a court of equity that upon facts about which there is no dispute, or no reasonable doubt, these officers have, by *a mistake of the law*, deprived a man of his right, it will give relief." (See also Baldwin *v.* Starks, 17 Otto, 463; Shepley *v.* Cowen, 91 U. S., 330; Osborne *v.* M. P. Ry. Co., 147 U. S., 248.)

If, then, it is clear that something was done which was contrary to the intention of the Executive, the Senate deceived, and something accomplished which it was not sought to accomplish, we contend that the equity jurisdiction of this court will relieve.

The Executive intent may be epitomized as follows:

First. His commutation on June 9 of the sentence of dismissal to six years' suspension on furlough pay;

Second. The official withdrawal of the order of dismissal

by the Secretary, addressed to claimant as "Commander U. S. N.," of June 12;

Third. The official notification to claimant of the commutation of his sentence by the Secretary of the Navy, of December 8;

Fourth. The fact that claimant was borne on the official Navy Register until 1883 as a Commander, and was advanced in numbers, from time to time, as vacancies occurred above him;

Fifth. The fact that the number of Commanders on the official Register of officers was, during claimant's suspension, kept within the limit allowed by law, to wit, ninety;

Sixth. The fact that he was paid furlough pay from June 9, 1874, to June 8, 1880, inclusive, and waiting orders pay from June 9, 1880, to March 31, 1881, inclusive, and borne upon the pay rolls to September 30, 1882, inclusive;

Seventh. The submission of all the facts and questions of law involved in claimant's case to the Attorney-General by the Secretary of the Navy in 1878, and the opinion of the latter officially defining his status as that of an officer in the Navy;

Eighth. The order of the Navy department of ——, 1880, authorizing the Paymaster at Boston to take claimant up on the pay rolls as on waiting orders pay;

Ninth. The fact that claimant entered upon, and fully served out his commuted sentence, with the full acquiescence and approval of President Grant, and his Secretaries of the Navy and Treasury, from June 9, 1874, to

March 4, 1877, and of President Hayes, his Secretaries of the Navy and Treasury, and his Attorney-General, from March 4, 1877, to March 4, 1881, and of President Garfield, and his Secretaries of the Navy and Treasury, from March 4, 1881, to September 10, 1881, and of President Arthur, and his Secretaries of the Navy and Treasury, from September 19, 1881 to August 1, 1883, and,

Tenth. The official statement of Mr. Hunt, Secretary of the Navy, of April 13, 1882, that it was the intention of the President that he (claimant) should be retained in the Navy, and that during his suspension from duty he had been officially recognized as an officer in the Navy.

Especially will equity intervene when no other person's rights, condition, or title, were affected to their disadvantage.

Mr. Robeson says in his letter of February 16, 1883:

> "The nomination of Schley '*vice* Quackenbush' went through in some incomprehensible manner, and when brought to my attention, as it made an excess of numbers, I ordered no nominations to be made for the position shortly after vacated by the retirement of Morris, which reduced the number of Commanders to legal limits."

The records of the Navy Department show that there were ninety Commanders borne on the active list of the Navy from the retirement of Commanders Morris and Bache up to August 5, 1892 [when the legal number was reduced by law.] (See Navy Registers.)

Schley, presuming he had passed his required examination, was eligible for promotion Oct. 21, 1874, when Morris was retired (see Navy Register of January, 1875); but he could not be promoted, in such sense as to give increase of pay until a vacancy actually existed.

(R. S., Sec. 1495.) Under the existing circumstances he was actually paid from June 10, 1874.

> "A prospective appointment to fill an anticipated vacancy in a public office, made by the person or body, as then constituted, which is empowered to fill the vacancy when it arises, is, in the absence of express law forbidding it, a legal appointment and vests the title to the office in the appointee." (Whitney *v.* Van Buskirk, 40 N. J. L., 463.)

The practical effect is, therefore, that Schley received the pay of a Commander for 102 days longer than he was entitled to it. His status in the Navy was, and can never be, in any wise affected by doing justice to Quackenbush.

Mullan's Nomination and Confirmation.

We come now to consider another phase of this most remarkable case. Claimant retained his position as a Commander in the Navy, under suspension on furlough pay for six years up to June 9, 1880. He was then placed on waiting orders and was so borne on the records of the Department, until Sept. 30, 1882. About this time there intervened the action of the Secretary of the Navy, which we regret, we can not find excuse for, on the ground of "mistake or blunder," but the records will not permit. It was a direct attempt to do that which he and his predecessors, President Grant and his successors, and various Attorneys-General and Treasury officials, had agreed had not been done by Schley's nomination and confirmation. It was an attempt to put him out of the service without trial by court martial, and was in direct violation of every principle of law and equity, and of the theory of our institutions, and of the statutes on our books.

On the 6th day of December, 1883, the Secretary submitted to President Arthur the nomination of D. W.

Mullan to be a Commander in the Navy "*vice John N. Quackenbush no longer in the service.*"

It is not presumable that the President's attention was called to this most remarkable condition of affairs, but rather, that being one of those nominations governed by law, he submitted it to the Senate as a matter of routine, as President Grant had done the nomination of Schley. There was no investigation by the Secretary of the facts in the case; there was no hearing granted Quackenbush, nor was there any notice to him. No charges were filed, no court of inquiry or court-martial was held, no opinion rendered by the Attorney-General, and so far as we know and the records show, the act was done solely by the Secretary. The first thing approaching an official announcement that Quackenbush was "no longer in the service," was the publication of the Naval Register of July, 1884, from which his name wholly disappears. An examination of these Registers for various years will show that it is customary in each succeeding one to account for every officer who was borne upon the previous one, and no longer in the service, by noting his death, resignation, or dismissal. A separate portion of the volume is appropriately entitled and devoted to this purpose. But no such disposition is made of the name of John N. Quackenbush. The Register of 1883 bears his name as No. 1 on the list of Commanders, but that of 1884 contains no reference to him. It has as completely disappeared as though he had never been borne thereon. Upon one of the official records of the Navy Department there is found, however, the following indorsement, opposite to the name of "John N. Quackenbush, Commander.":

> "Left off the Register published 1st August, 1883, by direction of the Secretary of the Navy, his action being based upon a decision of the Supreme Court."

This action of the Secretary was, in its practical effect, a dismissal and a patent attempt to do by indirection that which he could not accomplish by direction. There is no law or precedent for the dropping of an officer's name from the Register or official list of officers, but its result was as though he had been legally dismissed; being no longer an officer, so far as the records showed, he could not be, or at least was not, assigned to duty, and not being borne on the pay-rolls, no pay officer would take the responsibility of paying him his salary as it accrued. For the reasons which apply to Schley's case the nomination and confirmation of Mullan was a mere nullity, so far as it affected Quackenbush. It was more than that; it was a travesty and farce, and a violation of every constitutional right guaranteed by law and protected by military or civil courts. The Statutes (R. S., Sec. 1624; Art. 36, Sec. 1229) prohibit dismissal in time of peace, except in pursuance of a sentence of court-martial, or in commutation thereof. There had been but one court-martial and its sentence had been fully executed. No additional charges had been filed, and the culprit, having expiated his offense, was rehabilitated in all the rights and duties of his office. No man can be put twice in jeopardy for the same offense; much less can he be punished twice for the same offense, especially when the second punisment is imposed without notice or hearing.

Dismissal is dependent on the sentence of the court and the approval of the President, and as the act of the Secretary amounted to a dismissal it must have related back to the court-martial of 1874. The Secretary's duties are ministerial, not judicial. He has no power to fix an officer's pay. (U. S. *v.* Symonds, 120 U. S., 46; U. S. *v.* Bishop, 120 U. S., 51.) He likewise had no power to judicially decide that Quackenbush was "out of the service." He could at least have asked the advice of the

Attorney-General, upon a question involving such grave responsibilities to an officer whose rights he was charged by law and his oath of office to protect.

The Act for the Relief of John N. Quackenbush.

This Act is as follows:

"[Private—No. 169.]

"An ACT for the relief of John N. Quackenbush, late a Commander in the United States Navy.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

That the provisions of law regulating the appointments in the Navy by promotion in the line, and limiting the number of Commanders to be appointed in the United States naval service, are hereby suspended for the purpose of this Act only, and only so far as they affect John N. Quackenbush; and the President of the United States is hereby authorized, in the exercise of his discretion and judgment, to nominate and, by and with the advice and consent of the Senate, to appoint the said John N. Quackenbush, late a Commander in the Navy of the United States, to the same grade and rank of Commander in the United States Navy as of the date of August 1, 1883, and to place him on the retired list of the Navy, as of the date of June 1, 1895; *Provided*, That he shall receive no pay or emoluments except from the date of such reappointment.

"Received by the President, February 4, 1897."

"[Note by the Department of State:—The foregoing Act having been presented to the President of the United States for his approval, and not having been returned by him to the House of Congress in which it originated within the time prescribed

by the Constitution of the United States, has become a law without his approval.]" (28 Stat. L., 803.)

A critical analysis of this Act establishes claimant's right, irrespective of any considerations touching the legal effects of the nominations of Schley and Mullan, to recover waiting orders pay, as on the active list from August 1, 1883, to June 1, 1895, the date of his retirement under the Act, and the retired pay of his grade, since that date.

The President is authorized "to appoint said John N. Quackenbush, *late* a Commander in the Navy of the United States, to the *same* grade and rank of Commander in the Navy of the United States as of the date of August 1, 1883, * * * ."

The adjective "*same*" has definite relation to something "of a like kind, sort or degree" (Worcester's Dic.), and qualifying "grade and rank" refers to the particular grade or rank held by claimant when he was "late a Commander in the Navy of the United States," to wit: "as of the date of August 1, 1883." The words "late" and "same" are words of description and designation, and would probably have been equally effective in locating and fixing the grade and rank if reference to the specific date (August 1, 1883) had been omitted. The words "as of the date of August first, eighteen hundred and eighty-three" were, however, necessary and proper if the Act was intended to carry back pay; otherwise they are surplusage and tend only to create doubt and confusion as to the true meaning and intent of the Act.

The reason for fixing on this particular day is found in the indorsement on Register of the Navy, O, No. 1, p. 207, which is as follows:

> "Left off the Register published August 1st, 1883, by direction of the Secretary of the Navy, his action being based upon a decision of the Supreme Court."

To do full and complete justice to this claimant, which must be presumed to have been the legislative intent, it was necessary to fix some anterior date from which he should be paid the salary of a Commander. The date of Schley's commission was manifestly not the proper one: first, because he was not put out of the service thereby, and, second, because he was rightfully and properly paid furlough pay, under the cummuted sentence, up to and including June 8, 1880, and waiting orders pay from that date. The date of Mullan's commission was not the one from which to reckon his pay, because he was then borne upon the pay rolls. The natural and proper date was, therefore, the one chosen by Congress, viz: the date when his name appears to have been unlawfully erased and stricken from the official list of officers. Up to that time there was nothing of record in the Department tending to show that claimant was no longer regarded as an officer of the Navy; in fact he was published to the world as such.

The Congress was evidently, from its reports on the bill under consideration, fully advised of all the facts, and by fixing upon August 1st, 1883, as the date from which he should be placed in his "late" "grade and rank," clearly indicated its conviction that *up to that time* he had been IN FACT a Commander in the Navy, and also its purpose to do him complete justice from the date when his official recognition ceased. In this light, there was no use in going behind August 1st, 1883, and that was the natural and proper day from which the benefits of this remedial and beneficent Act should commence to flow. If it was not the intention of the Congress to do full, complete, and absolute justice to claimant, and to reinstate him in his old position with all the benefits and emoluments incident thereto, the words "to the same (late) grade and rank of Commander in the United States

Navy as of date of August 1st, 1883," are surplusage. This more clearly appears from the fact that the Act further provides for claimant's retirement "*as the date of June 1st, 1895.*"

The act of August 5, 1882, (22 Stats., 284; Sup. R. S., 377) prohibits "promotion or increase of pay in the retired list of the Navy," and by law (Sec. 1556, R. S.) the grade of Commander has but one pay period. Hence claimant's *late grade* and rank "as of the date of August 1st, 1883," and the date from which he is to be placed on the retired list, viz: "as of the date of June 1st, 1895," have no effect or bearing whatever upon his rights or duties as a retired officer. The duties and obligation of a retired officer are fixed by Sec. 1457, R. S., viz:

> "They shall be entitled to wear the uniform of their respective grades, and shall be subject to the rules and articles for the government of the Navy and to trial by general court martial."

In no case, however, are their privileges or burdens increased or diminished by reason of the date of their commission in their respective grades, or the date of their retirement.

The duties of a Commander on the active list are prescribed by law and regulations, and the position of such an officer on the list of Commanders fixes only his right to perform those duties in preference to some one else. It gives him precedence in certain cases over his juniors, and is at times of material consideration in his assignment to duty, and is an essential element in his right to promotion, but it has no such effect in the case of a retired officer. It can never affect the latter in any way, except in time of war, and then only in case the President sees fit to detail him by and with the advice and consent of the Senate (R. S., Secs. 1462 and 1463), to

active duty. In that event such an officer would probably take precedence of his junior in rank, if the two were thrown together. It would be a violent presumption, however, to say that the Congress in time of profound peace has exercised such great ingenuity to provide against so remote a contingency. To give these words any effect, therefore, they must be construed as defining, describing and definitely locating the office claimant is to occupy, the date from which such occupation is to be reckoned, and all the incidents thereunto appertaining, one of the most important of which is that of pay.

As above shown, the date of his going upon the retired list in no way affects claimant's rights, duties, or liabilities as an officer; but for the evident intention of Congress to give a retroactive effect to the relief act every purpose would have been served by something like the following:

> "The President is hereby authorized, in the exercise of his judgment and discretion, to nominate, and by and with the advice and consent of the Senate, to appoint John N. Quackenbush a Commander in the Navy of the United States on the retired list."

Such language would have effected the desired end, and left no doubt as to the date from which pay should commence, because as a rule, legislative acts go into effect from the date of their approval. Why, therefore, the insertion of the dates, August 1, 1883, and June 1, 1895? The answer is plain; it was for the purpose of retroactively fixing his date on the active list and retired list, as it would have been if no complications had arisen. On June 1, 1895, he would have been retired by operation of law, having reached the age of sixty-two years. (See Comps. Dec., June 17, 1897.)

Full force and effect must be given to every word of a

statute, if possible, and remedial statutes must be construed liberally and in favor of the beneficiary.

If this be true, some force and effect must be given to the following:

> "That the provisions of law regulating appointments in the Navy by promotion in the line, and limiting the number of Commanders to be appointed in the United States Naval Service, are hereby suspended for the purposes of this Act only, and only so far as they affect John N. Quackenbush."

These words as they appear in the relief Act, precede the clause granting discretionary power to the President to nominate Quackenbush "to the same grade and rank of Commander in the United States Navy as of date of August 1, 1883," and for many reasons can only refer to a suspension of the laws governing promotion and limiting the number of officers on the active list in the grade of Commander.

In the first place there is no law authorizing "promotion in the line" on the retired list. On the contrary such promotion is prohibited by the Act of August 5, 1882 (22 Stat. L., 286), which repealed Sec. 1461 R. S., in the following language:

> "Hereafter there shall be no promotion or increase of pay in the retired list of the Navy, but the rank and pay shall be the same that they are when such officers shall be retired."

Hence, as there was no law regulating appointments by promotion on the retired list, there was none which could be suspended so far as they affected John N. Quackenbush, or any one else.

But the number of all officers on the active list was fixed by the Act of 1870 (Sec. 1363, R. S.), as follows:

"Sec. 1363. There shall be allowed on the active list of the line-officers of the Navy * * * ninety commanders * * * ."

By the Act of 1882 (*supra*) that number was reduced to eighty-five (22 Stats. L., 286), and such is the law to-day.

Quackenbush had been promoted to the grade of Commander in 1871, and was still in that grade when the complications in his case arose. The question of his actual promotion could not, therefore, be effected by the relief Act, because it was a completed fact; but conceding, for the purposes only of this argument, that he was legally put out of the service August 1, 1883, there must have been, in some way, a suspension of those general laws which provide for the existence of a vacancy, and which limit the number of Commanders, before he could legally be put in such list. This Congress saw fit to do in express words, rather than by implication."

As shown in Finding XII, the number of Commanders was kept down to the legal limits, *i. e.*, ninety, up to August 5, 1882, when the number was reduced. It was, therefore, the act of this date which was suspended in claimant's favor, and so far as it affected him only, the legal number was increased to eighty-six from August 1, 1883. A vacancy was created for him by the Relief Act from that date, and the President was authorized, in the exercise of his judgment and discretion, to appoint him to that grade "as of the date of August 1, 1883." And this he did.

Again, the provisions as to the suspension of these laws can only refer to his status on the active list, because, as before shown, there were no laws regulating promotion on the retired list to be suspended, nor is there any law *limiting the number of officers on such list.*

The Revised Statutes, under the title, "Retired Officers of the Navy" (Sections 1443 to 1465), contain all the provisions of the law regarding the method of, and causes for retirement; and sections 1558 to 1595 fix their pay. In none of these sections, nor by any subsequent legislation, is the number of retired officers in any grade limited. From the nature of retirement, this could not be otherwise, because it is not within the wisdom of the legislature to tell at what moment, any one, or more, of the officers of any grade may become incapacitated from active duty by reason of wounds, disease or incidents of the service.

It follows, therefore, that if our view of the relief Act is not sustained, the court must eliminate from the body of the Act that clause which enjoins the suspension of all laws regulating promotion and those limiting the number of Commanders; all reference to his "late" grade, and to "the same grade and rank of Commander," and to the dates of August 1st, 1883, and June 1st, 1895. Nothing remains but the naked power given the President to appoint and the *proviso*. The body of the act itself becomes surplusage, and the *proviso* alone retains validity.

Mr. Justice Bradley says in this case (U. S. ex rel Quackenbush *v.* Herbert, Sec'y Navy, No. 38,068, Law, Supreme Court, D. C.):

> "The correction of this error from which Commander Quackenbush has so long suffered would be a simple act of justice. It should be corrected not only as a matter of righting a wrong to an injured and powerless citizen, but as matter of honor on the part of a great and just Government."

This error can never be wholly corrected. No money which can be recovered by suit in this court, or elsewhere, can ever repay this claimant for the years of disgrace and

penury through which he struggled, or for the mental anguish and humiliation which he suffered. But a "great and just Government" can do that measure of justice which good conscience demands and which the peculiar circumstances of this case warrant. The intent can not be imputed to the Congress of doing only partial justice where the facts show that great wrong and injustice has been done, and great injury suffered. The presumption is that it was the intention, so far as the circumstances permit, to re-establish the *statu quo*. In this case this can be done by giving to the words of the relief Act a plain, sensible and reasonable construction, and one in perfect accord with fairness and equity, and not by holding them to be mere surplusage.

The Proviso.

The construction for which we contend is emphasized, however, by the *proviso*, which is as follows:

> "*Provided*, That he shall receive no pay or emoluments except from the date of such *re-appointment*.

The moving cause for this proviso is evident. The Congress was fully advised of all the harshness and inequities of the case. It knew that Schley had been nominated and confirmed "vice Quackenbush dismissed," when in fact he had not been dismissed. It knew that Mullan had been nominated "vice Quackenbush no longer in the service," when in fact he had just finished serving a six years' sentence of suspension, and was then borne upon the records of the Navy Department and recognized as an officer. It knew further that he had simply been eliminated from the Naval service without charges, trial, hearing, or notice, by the arbitrary and illegal order of the Secretary. But it also knew that his dereliction in 1874 was serious, and deserving of adequate punishment,

and, therefore, it was provided that nothing transpiring prior to August 1, 1883, should be affected, and that the broad general terms of the Act giving him pay back to the time his name was illegally stricken from the records, should not, by possible construction, be so extended as to relieve him against the effects of the commuted sentence, which cut his pay down to $1,150 per annum, up to June 9, 1880, the expiration of such sentence.

To this end the word "*reappointment*" was used advisedly. If the Act had said "except from the date of such *appointment*," there might have been graver room for doubting its retroactive effect and intent, when taken as a whole.

If the proviso had read "Provided, That he shall receive no pay or emoluments except from the date of such *appointment*," the court might have been justified in holding that the references to his "late" position, and to the "same grade and rank" and "to August 1, 1883" were by way of inducement, and that the word "*appointment*" referred to his being placed on the retired list "as of the date of June 1, 1895." In such event his being placed upon the retired list would have been the main feature of the Act, and the only question which could have arisen would have been whether his pay should date from June 1, 1895, or from May 26, 1897, the date he became an officer under the Act. If such had been the intent of Congress it would have been fully expressed by the word "*appointment*" because the act of the President in placing him on the retired list was essentially an *appointment*, for the reason that he had never before held such position; but it was in no sense a *reappointment*.

In the case at bar, however, his reinstatement to his "*late* grade and rank" as of August 1, 1883, was the main feature of the act, and placing him on the retired list was

only an incident thereto. An incident owing to the fact that on June 1, 1895, he reached the age of 62 years. The insertion of this date may, indeed, be considered as surplusage. If it had been omitted claimant would nevertheless have at once been retired because of age under the provisions of Section 1444, R. S., which is mandatory. It is evident, therefore, that the main object to be attained was his rehabilitation in the service; fixing the date of retirement was only an unnecessary designation of one of the results, but if that result naturally follows such rehabilitation, so must all others, especially pay.

The President's power under the act is "*to appoint*" * * * to the same grade and rank, etc.

It was not necessary to use the word "*reappoint*" in this connection, although it would have been entirely appropriate. The description of the place, position, or office was sufficiently exact without the use of that word. A person may be appointed to a place which he has before held one or more times, but he can never be "reappointed" to a position which he has never held. Hence, in the proviso as it appears, where it is necessary to preclude the idea of the act taking effect from its passage, or from the immaterial date of claimant's retirement, and to distinctly fix the date from which it should take effect, the exercise of the President's power "to appoint," is described as a "reappointment." **"Re"** is a prefix or inseparable particle in the composition of words, denoting return, iteration (Webster Dic.). An inseparable prefix of Latin origin, meaning "back," "again," * * * a restoration to a former state, as restitution, reintegration, etc.; repetition of an action (again), as in revise, resume, etc. **"Reappointment,"** a renewed appointment (Century Dic.). This word presupposes one or more prior incumbences by the appointee, of the particular

office, place, or position to which the appointment is made. As used in the Act under consideration that word is synonymous with the word "reinstate" as used in similar statutes and as construed by this court.

The case of Major Collins (15 Ct. Cls., 22) is so nearly identical with the case at bar as to be controlling.

On May 24, 1897, A. S. Crowningshield addressed a letter to claimant inclosing him a commission under the Act for his relief, in which he says, "the President, by and with the advice and consent of the Senate, having appointed you a Commander in the United States Navy as of the date of August 1, 1883 * * * ." On the same date the Secretary of the Navy addressed him as follows:

> "Having been commissioned a Commander in the United States Navy, as of date August 1, 1883 * * * ."

These letters bear no uncertain testimony as to the Executive understanding of the Act, and the commission itself reads:

> "I have nominated and with the advice and consent of the Senate do appoint him a Commander in the Navy of the United States from the 1st day of August, 1883 * * *."

In the Collins (*supra*) case the Special Act did not require the consent of the Senate, and in this alone does it differ in any essential particular from the case at bar.

The act was shorter, but no broader, and no clearer in its terms than the one now under consideration. It reads:

> "That the President be, and he is hereby, authorized to reinstate Major Joseph B. Collins, late of the United States Army, and to retire him in that grade as of the date he was previously mustered out,

charging him with all extra pay and allowances paid him at that time." (20 Stat. L., 484.)

The one act uses the word "reinstate," the other "reappointment"; the one says "in that grade as of the date he was mustered out," the other, "to the same grade and rank in the United States Navy as of date of August 1st, 1883." The one refers to "Major Joseph B. Collins, *late* of the United States Army," thereby declaring that he had formerly been a Major; the other refers to "said John N. Quackenbush *late* a Commander in the United States Navy"; and, finally, both provide for retirement upon a specific date; the one "as of the date he was mustered out"; the other "as of the date of June 1st, 1895," the date when he must, in any event, have been retired on account of age.

Thus far the two acts, drafted for the same purpose, are identical in meaning, and singularly so in language, when it is considered that they originated in disassociated minds. This fact is worthy of consideration as indicating the unity of purpose and intent of the legislature.

They are dissimilar, however, in one respect. The one requires the repayment of certain moneys already received; the other prohibits further payment for services already remunerated. Both, however, demonstrate the fair and just intent of Congress: that in one case the beneficiary should not receive more, by way of compensation, than he would have received if he had not been dismissed, and in the other that compensation for services rendered on reduced pay, pursuant to a merited sentence of court-martial, should not be increased.

It is worthy of note in this connection, that the military status of Major Collins had not been subjected to the departmental jugglery which appears in Quackenbush's case.

Judgment was rendered by the Court of Claims in favor of Major Collins, and was acquiesced in by the Department of Justice, no appeal being taken.

We call the attention of the court to the language used by Mr. J. Schofield in Kilburn *v.* U. S. (15 Ct. Cls., 46, 47), as being peculiarly applicable to the facts in this case.

> "In all the cases referred to, the parties to whom back pay has been allowed have been considered by Congress to have been illegally or unjustly or inadvertently dismissed the service. In order to remedy the wrong or repair the injustice, of such dismissal, it has been considered both just and humane that its revocation should be complete, and should relate back to the day of the order of dismissal, so as to make the party entitled to full pay, as though no such order had ever been made. (Winters *v.* The United States, 3 Ct. Cls. R.; Smith *v.* United States, 2 Ct. Cls. R., 140). But such arrearages of pay have in every instance been allowed only under Acts of Congress authorizing the beneficiaries under them to *assume a definite rank from a past date.* This doctrine is fully expounded in the case of Major Collins."

The Act of July 8, 1888, (25 Stats., 241) authorized the President, by and with the advice and consent of the Senate, to appoint "in their proper grade and rank," certain cadet engineers, who had been illegally dropped from the Navy Register by Secretary Chandler, "Provided: That the commissions of the class of 1881 be dated from July 1st, 1883 * * *."

The lower court held that the Act carried back pay and gave judgments for the claimants, which was acquiesced in by the Navy and Treasury Departments, and no appeal was taken. (McAlpine *v.* The U. S., 27 Ct. Cls., 491). With the proper substitution of names and dates either act would serve for either the classes of Cadet Engineers, or for Commander Quackenbush.

In U. S. *v.* Vinton (2 Sumner, 299), Mr. Justice Story says:

> "If the words, then, are to have any meaning they confer on Captain Vinton the brevet rank of Captain from that time. If they confer on him that rank from that time then they confer on him also the pay and emoluments of that rank when he is on duty, and has a command according to that rank from and after that time."

In this case the commission read "to take rank from the 30th of September, 1829." Quackenbush's commission reads "I,....., do appoint him.....from the 1st day of August, 1883."

The same question has arisen in several cases, and has uniformly been decided in favor of the claimant. It first arose in Smith *v.* The U. S. (2 Ct. Cls., 206). This case was followed in Winters *v.* The U. S. (3 Ct. Cls., 136); Barns *v.* The U. S. (4 Ct. Cls, 216); Reynolds *v.* The U. S. (3 Ct. Cls., 167), and Montgomery *v.* The U. S. (5 Ct. Cls., 93).

These cases all depended upon an order of revocation issued by the President, and are no longer authority upon the effect of a revocation, since the decisions by this court in Mimmack *v.* U. S. (10 Ct. Cls., 202, 10 U. S., 426), Blake *v.* U. S. (14 Ct. Cls., 460, U. S. 227), and Keyes *v.* U. S. (15 Ct. Cls., 533, 109 U. S., 336). These latter cases, however, only went to the effect of the *revocation*, and not to the question of pay. In Palen *v.* U. S. (14 Ct. Cls., 389), this court clearly indicates its adherence to its prior opinion, assuming "that such power (that of revocation) might legally be exercised by the President."

If any such revocation were necessary in the case at bar, it was made by Congress.

If this Court holds, as we submit it must, that Quacken-

bush was never legally out of the Navy, the Statute of Limitations (so-called), might possibly be invoked to cut off all that portion of the claim which accrued more than six years prior to the filing of the petition in this court. For reasons already stated, this is cured by the Act for claimant's relief.

If, on the other hand, this court holds that Schley's or Mullan's nomination and confirmation, or both jointly, were sufficient to put this claimant out of the service, then we rely upon its general equity jurisdiction to relieve against a palpable and admitted mistake, and to right a great wrong, and upon the relief Act as evidencing the intent of Congress, and as indicating to this Court its plain duty in the premises.

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